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Implications for the European Community

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FEDERAL-STATE RELATIONS IN U.S. ENVIRONMENTAL LAW: IMPLICATIONS FOR THE EUROPEAN COMMUNITY

I. INTRODUCTION

The adoption of the Single European Act (SEA) by the Council of the European Communities in 1985 established for the first time an unequivocal authority for the EC to regulate in environmental matters. The SEA's timetable for economic integration by 1992, together with its companion goal of integrating environmental protection requirements with other Community policies, has set the stage for the EC to assume a more active and complex role in environmental affairs. The increased engagement of supranational legislation with the dynamic, diverse, and often sophisticated bodies of law prevailing in EC member-states, raises questions of balance and function with compelling parallels in the US federal system, in particular with the evolving relationship of the US federal and state governments in regulating environmental matters.

With the premise that the US federal-state experience can be instructive as the EC assumes a more intensive and integrated environmental role, this paper presents an analysis of federal-state relations under three US environmental statutes. It begins with some general and theoretical observations on the federal-state partnership, and then describes the allocation of governmental functions under specific provisions of the US Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act–the comprehensive US law for hazardous waste management and disposal.

The three statutory programs examined herein reflect highly specific Congressional judgments as to the proper role of the federal and state governments in regulating various types of pollution. But they have a broader application as well, with respect to the perceived strengths and weaknesses of state governments in implementing environmental requirements, and to the desirability of uniform national standards–indeed even to what is meant by "uniformity" or "equivalence" where environmental standards are concerned.

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II. THE US FEDERAL-STATE PARTNERSHIP

A. Federal-State Relations are Program-Specific

At the outset, it must be recognized that no single, idealized concept of a federal-state relationship prevails under US environmental statutes. The intended level of federal involvement, and the precise role of the states, varies enormously among the federal laws. Moreover, these functions typically vary *within* a single statute, so that an inquiry is best directed to a particular provision or "program" within a statute.

In this respect, a federal-state relationship under a given statute can be said to be "program-specific"—the term "program" denoting some functional subset of a statute that strikes a unique balance between the roles played by the federal and state governments. Examples of such "program" subsets include the State Implementation Plan (SIP) provisions of the Clean Air Act, the National Pollutant Discharge Elimination System (NPDES) permitting provisions of the Clean Water Act, and the Underground Storage Tank provisions of the Resource Conservation and Recovery Act (RCRA). Each of these programs embodies a different federal-state relationship, reflecting a different Congressional intent with respect to the desired nature and extent of state participation.

B. Functional Analysis as a Starting Point

Despite the variable nature of the federal-state partnership within and among federal statutes, certain norms prevail, and the roles assigned can be grouped loosely according to administrative function. Principal "functions" include standard-setting, permit-issuance, enforcement, planning, monitoring, and other implementation activities.

Under US federal statutes, these functions typically are allocated either to the federal or to the state agency charged with administering the law. Often the federal government is initially charged with administering some aspect of a program, *e.g.*, permit issuance, but with the intent that it be taken over by the state at the earliest time the state can demonstrate a competence to do so. In some cases, however, such as enforcement, a function can remain shared, with an intended level of redundancy, but with the state having the first opportunity to respond.

Some program-specific examples of functional allocations include standard-setting under RCRA's hazardous waste subchapter, which rests exclusively with the federal agency (US EPA); water quality standard-setting under the Clean Water Act, which is allocated in the first instance to the states; and pollutant discharge permitting under the Clean Water Act, which transfers to the states only upon approval of a state program submitted according to set of specific criteria.

C. Functional Allocation in a Historical Context

Functional descriptions such as those listed above have considerable utility as a starting point for more in-depth analysis. The allocations often reflect a considered Congressional policy choice regarding the appropriate roles of the federal and the state agencies. In seeking to characterize the federal-state relationship, however, such quantitative analyses are ultimately simplistic. A valuable qualitative perspective can be gained by considering the historical circumstances leading to enactment of the federal statute.

Federal environmental statutes, drafted in the late 1960s and early 1970s, frequently sought to bring a federal presence to bear in legislative areas where only the states previously had been active, or where federal presence had been limited. Accordingly, an examination of the preexisting state or federal programs is useful in understanding Congressional intent in introducing more comprehensive federal legislation. What shortcomings in the state programs prompted expanded federal involvement? Did Congress seek to replace entirely state regulation it considered ineffective? Or did it seek merely to supplement or unify a field of otherwise effective state law?

Key programs within the three statutes analyzed in this paper each reflect a different set of Congressional concerns with the body of preexisting law. The Clean Air Act in 1970 took air quality standard-setting away from the states, making it exclusively a federal function. This expansion of the federal role reflected a Congressional judgment that the states had failed to develop effective regulatory schemes, as well as the belief that a uniform set of standards would be in the national interest.

The Clean Water Act provisions for discharge permitting represent precisely the opposite evolutionary course. In 1972, amendments to the federal clean water statute *replaced* a federal permitting scheme with the NPDES program, intended for the swiftest possible assumption by the states. This evolution reflected a Congressional judgment that the federal permitting program had been ineffective or inefficient, and that the states were best situated to carry out the permit process.

When Congress enacted RCRA in 1976, it wrote on a clean slate—at least insofar as federal law was concerned. In a field characterized by weak and erratic state legislation, Congress sought to establish nation-wide uniformity in standards for hazardous waste management and disposal, while enlisting the states' assistance in permitting and enforcement. The notion of nationally uniform standards was based in part on the highly mobile nature of hazardous wastes, and the desire to eliminate so-called "pollution havens"—the least stringent state regulatory environments that attract industries seeking to evade strict regulatory controls.

D. Some Recurrent Patterns of Allocation

Several themes emerge from the functional allocations in the programs discussed above. The first is Congress's tendency to favor federal, national standard setting. This reflects the reality that the federal government's financial and technical resources enable it to conduct the research upon which standards (often health-based) are based. In addition, nationally uniform standards place states on an equal footing, avoiding the spectre of states competing for industry by enacting weak standards. The federal government makes one choice for all, and states are not left to regulate stringently at their own economic peril.

Permitting, on the other hand, is a function for which Congress often finds the states best suited. In issuing permits for water pollutant discharge and hazardous waste storage, states frequently had superior knowledge of local conditions, hydrogeologic regimes, and population patterns. Reliance on state implementation also avoided the need to create new federal bureaucracies.

More than the other administrative functions, enforcement is a role shared by both the federal and state agencies. Where a state has demonstrated an adequate ability to carry out a federal program, enforcement generally rests with the state in the first instance. This reflects the view that states presumptively are fully capable of bringing enforcement actions, and a desire by Congress to utilize state enforcement resources. Nevertheless, states often remain subject to local political pressures that may compromise vigorous enforcement. Accordingly, the federal government retains its enforcement powers, even where a state has been designated to carry out the core program. This "fail-safe" mechanism ensures that enforcement will take place, although commencement of a state action may preempt federal enforcement. In each of the three programs discussed in this paper, the EPA Administrator retains an enforcement responsibility.

III. The US Clean Water Act: The NPDES Permit Process

Federal-state interface under the US Clean Water Act occurs under several provisions, within several discrete program areas. Some examples include state promulgation of waste treatment management plans[1], setting of water quality standards[2], and issuance of permits for discharges of dredged or fill material.[3] In addition, states play an absolutely central role under the National Pollutant Discharge Elimination System (NPDES) permitting program under Section 402 of the Act. A discussion of this program follows.

A. State Assumption of the NPDES Permit Process

A central feature of the Clean Water Act is its strategy to control point-source water pollution through discharge permitting under the NPDES permitting program. Virtually all discharges into the nation's waters require a permit under this system. Although the Act authorizes EPA to issue discharge permits, a state may submit for federal approval a permit program it proposes to establish and administer under state law.[4] If the program conforms with certain statutory requirements, EPA is required to suspend operation of the federal program in that state. Swift state assumption of the program was Congress's intent.

Once the permitting function has been assumed by the state, EPA retains a veto power over issuance of individual permits.[5] In this respect, permit issuance remains a shared function. Enforcement against permit violations rests initially with the state, but EPA's enforcement authority remains unrestricted following its approval of a state permit program. EPA may, however, elect to give thirty days prior notice to the state to allow it to commence appropriate enforcement action.[6]

B. The Historical Context

Although the predecessor to the NPDES program had been federal in all respects, that predecessor was itself a marked departure from a long history of state primacy in water pollution control. The Clean Water Act Amendments of 1972, which instituted the NPDES, were an attempt to restore state primacy. The legislative history surrounding the amendments contains an express Congressional recognition of the unique capacities of states in implementing federal law.[7]

C. Standard-Setting Under the NPDES

Standard-setting under the NPDES program is both a federal and a state function. The Clean Water Act establishes nationwide minimum standards for pollutant removal by requiring application of increasingly stringent control technologies.[8] The Act also requires each state to set water quality standards for waters within its jurisdiction.[9] These two standards—the federal technology-based standard and the state environmental quality standard—are combined to formulate effluent limitations incorporated into the terms of each

NPDES permit.[10] The permit effluent limitations are the ultimate enforceable standard under the NPDES program, and reflect the more stringent of the federal technology-based and state environmental quality standards.

D. Federal Approval of State Permit Programs

The Clean Water Act requires EPA to evaluate and approve each proposed plan if the state applies minimum effluent limitations in the permits it grants, and if it monitors and enforces the terms of the permits.[11] The Agency's determination on this matter is reviewable in the US Court of Appeals.[12]

The legislative history documents an intent by Congress to confine EPA's discretion in approving state programs.[13] The final bill, as amended, required the EPA Administrator to approve a state plan upon satisfaction of the express statutory requirements–a marked departure from a previous version which had merely authorized approval if the statutory conditions were met.

Congress's intent to hasten enlistment of the states in implementation is further demonstrated through provisions for "interim authorization" of existing state programs. Interim authorization was intended to allow continuance of existing state programs, so that in instances where states were active in their own right, their programs would not be displaced even temporarily by a federal analog.

Following approval of a state program, the federal role is reduced to four principal activities: 1) review of individual permits; 2) enforcement against individual permit violators; 3) assessment of unaddressed violations for the purposes of withdrawing federal approval; and 4) review of the state program as a whole for the same purpose. These residual capacities are discussed in turn.

E. Review of Individual Permits

EPA's role concerning permit issuance is largely supervisory once a state NPDES program has been approved. If a state-issued permit does not comply with the requirements of the Act, EPA may veto the permit.[14] Under the original bill before Congress, no permit could issue without either federal approval or an affirmative waiver of the right to object. In a House-Senate conference this requirement was changed to allow the state to issue a permit unilaterally unless EPA objected in writing or a complaint was received by another state. Moreover, EPA was allowed to object only on the basis of a published regulation or guideline, and not for a reason of general policy.[15]

F. Federal Enforcement Against Individual Permit Violations

The Clean Water Act provides EPA with a residual enforcement authority. A bifurcated procedure allows EPA either to proceed against a violator directly, or to provide notice of the violation both to the state and to the violator.[16] If the latter course is taken, EPA must issue a compliance order or commence a civil action if the state does not undertake appropriate enforcement action within thirty days. The legislative history reflects

Congressional intent that EPA maintain a vigorous enforcement presence in states with approved NPDES programs with a mandatory duty to enforce in the absence of appropriate state action.[17]

G. Federal Assumption of Enforcement

When EPA finds permit violations under an approved state program to be so widespread as to indicate a failure of the state to enforce permit conditions or limitations effectively, EPA must notify the state.[18] If the state failure to enforce continues beyond the thirtieth day after notice, EPA is required to enforce permit conditions by issuing compliance orders or initiating civil actions. This procedure—"federal assumption of enforcement"—continues until the state satisfies EPA that it will provide adequate enforcement.

The Clean Water Act's provision for federal assumption of enforcement is something of an anomaly, modeled on a similar provision in the Clean Air Act.[19] Although it follows the language in the Clean Air Act provision virtually word-for-word, in the context of their respective statutes, the two provisions have significantly different effects.

Federal assumption of enforcement under the Clean Air Act serves primarily to unfetter EPA's enforcement powers. It removes from EPA's path a procedural obstacle that thirty days prior notice be given to the state and to the violator, as well as a requirement that the violation continue another thirty days beyond such notice.

The Clean Water Act places no similar restrictions on residual federal enforcement authority. In states with approved programs EPA always retains its authority to enforce directly, without thirty days prior notice to the state and without regard to continuance of the violation. Thus, inclusion of the Clean Air Act provision makes little sense in the context of Clean Water Act residual enforcement authority.

H. Withdrawal of Program Approval

In addition to its authority to assume enforcement, EPA may withdraw approval of a state NPDES program not administered in compliance with the Act.[20] Congress intended that this authority be exercised only in extreme situations, but that when necessary, "withdrawal shall be of the total program and not of bits, pieces, categories, or other parts."[21] There is a requirement of ninety days notice, during which the state may correct the deficiencies specified by EPA.[22]

IV. State Implementation Plans Under the US Clean Air Act

The US Clean Air Act provides a role for the states under several provisions. These include: 1) state enforcement of federal emissions standards for hazardous air pollutants[23]; 2) state enforcement of federally-promulgated performance standards for new stationary sources[24]; and 3) state standard-setting for emissions performance of existing sources.[25] By far the most complex area of federal-state interaction, however, is the State Implementation Plan or "SIP" which provides for state implementation of federally-promulgated national ambient air quality standards.[26] A discussion of the Clean Air Act SIP program follows.

A. The Role of the SIP

Foremost among the Clean Air Act's stated purposes is the protection and enhancement of the quality of the nation's air resources.[27] This statement of purpose is incorporated into the Act immediately following Congressional findings that prevention and control of air pollution is primarily a responsibility of the states, but that federal leadership is essential for the development of cooperative state and federal pollution programs.[28] The key Clean Air Act program tying the objective of air quality to federal-state cooperation is the State Implementation Plan.

The SIP is a mechanism by which Congress sought to utilize state resources to attain federally-set air quality standards. The Act requires EPA to promulgate national ambient air quality standards (NAAQS) for "criteria pollutants,"[29] and directs states to adopt implementation plans to achieve the NAAQS.[30] In practical terms, the SIP is the means by which a federal environmental quality standard is translated into an emission limitation enforceable at a pollution source under state law.

At the outset, several aspects of this scheme bear mention. First, the federal government has set the central environmental quality standards–the NAAQS–which the states are to achieve through, *inter alia*, permitting and enforcement under the SIP. Structurally, this represents the inverse of the Clean Water Act scheme discussed above in which states set environmental quality standards for intrastate waters–standards the federal government, at least in the first instance, seeks to implement through the NPDES permitting process and enforcement.

The SIPs, however, in addition to providing for permitting and enforcement, embody a substantial, if collateral, standard-setting component. For example, the Act requires that SIPs include emissions limitations, schedules, and timetables (including transportation controls, air quality maintenance plans, and preconstruction review of direct sources)–as necessary to ensure attainment and maintenance of the primary and secondary NAAQS.[31] Similarly, the Act requires that SIPs include provisions prohibiting stationary source emissions in amounts that interfere with attainment of primary and secondary standards.[32]

These state-set performance standards are ultimately "satellites" of the federal environmental quality standards: they relate primarily to procedure and implementation, and rely on the federal standards to give them definition. Although the SIP has the necessary components of a complete regulatory program–provisions for standard-setting, implementation through permitting, and enforcement–it is tied to the federally- prescribed air quality standards and cannot be considered truly independent of them.

B. The Historical Context

The advent of the SIP in the 1970 Clean Air Act amendments heralded a significant expansion of the federal role in controlling air pollution. Under the preexisting regulatory scheme, the 1967 Air Quality Act[33], states were to achieve ambient air quality through implementation plans. The air quality standards, however, were to be adopted by the states in the first instance. The SIP retained the state role in implementation, but shifted to the federal government the task of setting the underlying standards for implementation.

C. Approval of a SIP

A proposed SIP that meets a series of substantive and procedural requirements is required to be approved by EPA within four months of submission.[34] If the state fails to submit an adequate SIP, EPA is required promptly to prepare and publish an implementation plan for the state.[35]

Congressional intent in 1970 was to encourage states to design their SIPs around local needs and conditions. The legislative history confirms the drafters' intent to "give State and local authorities sufficient latitude in selecting ways to prevent and control air pollution."[36] Thus, while the Act requires a state to demonstrate that it can afford a program, and that it will achieve national ambient standards within three years, it does not mandate specifics as to *how* each state should proceed. As a consequence, EPA has little authority or influence over the content of a SIP. The US Supreme Court has held that in reviewing a SIP, EPA has "no authority to question the wisdom of a State's choices of emissions limitations if they are part of a plan which satisfies the standards of [the Act]."[37] Both houses of Congress clearly intended that SIP approval be mandatory upon satisfaction of explicit statutory requirements. Courts recognizing this intent have concluded that EPA may not reject a SIP on the basis of any other criteria, including economic or technological feasibility.

D. Federal Oversight of a SIP

Once a SIP has been authorized, EPA maintains an oversight role with respect both to the content and continuing adequacy of the SIP, and to SIP enforcement. There is no provision for withdrawal of SIP approval. When a state fails to enforce a plan effectively, however, EPA respond by "federal assumption of enforcement"–a procedure which expands federal enforcement authority by eliminating a requirement that thirty days prior notice be given to the state and to the violator.[38]

A primary EPA oversight role concerns the need for SIP revision. Revision of a SIP may become necessary for several reasons. First, EPA's periodic review and revision of the NAAQS, as required by the Act, may necessitate a corresponding revision of the SIP. Independent of any NAAQS revision, EPA may find on the basis of new information that the SIP is "substantially inadequate" to achieve the NAAQS.[39] Finally, the state may seek to promulgate changes in the SIP in response to new technology or to allow individual source variances.[40]

Any revision of the SIP requires an approval by EPA, although the Act is silent on procedures governing such approval. If the state fails to adopt necessary revisions to the SIP, EPA must revise the plan. A finding that a SIP is inadequate does not empower EPA to *order* the state to enact more stringent statutes or regulations. A federal appeals court has rejected the argument that EPA can compel state action, reasoning that Congress would have been explicit had it intended to "convert state legislatures into arms of the EPA."[41]

E. Enforcement Under the SIP–A Shared Function

As with other programs discussed in this paper, the Clean Air Act intends EPA to retain an enforcement authority, following approval of the submitted SIP. The federal role here is one of augmenting state enforcement efforts. Questions remain concerning the scope of federal enforcement authority, and the appropriate federal response once a state has initiated an enforcement action.

Prior to the Clean Air Act amendments in 1970, Congress had fashioned a much narrower role for federal enforcement. The 1967 Air Quality Act authorized the federal agency to bring suit for abatement of pollution presenting an imminent and substantial endangerment to public health, where state and local authorities had failed to act. In addition, the agency was authorized to bring suit to abate pollution that crossed state boundaries. But for intrastate pollution, the federal agency was authorized only to assist the state in judicial proceedings or to bring suit upon request of the state governor.[42]

The 1970 Clean Air Act amendments sought to expand federal enforcement authority. The report accompanying the Senate bill provided the following view on the need for expansion of the federal role:

> *The* [existing federal clean air statute] *recognizes that the primary responsibility for control of air pollution rests with State and local government. While* [the enforcement provision in the Senate bill] *would restructure the enforcement authority available to the* [responsible agency official], *the Committee does not intend to diminish either the authority or the responsibility of state and local governments. . . . States would be expected to have or to obtain adequate authority to ensure that the provisions of the Act are enforced.*
>
> *The Committee recognizes, however, that the authority under existing law has not been adequate to move quickly to abate violations of standards. The Committee also recognizes that the provisions of existing law, although less than adequate, have not been used to the fullest extent practicable. The new authority provided in* [the Senate bill] *would provide the* [responsible agency official] *with*

the necessary tools to act swiftly to abate violations of the Act. The [responsible agency official] *should not interfere with effective State action and should take into consideration any recommendations for abatement action which have resulted from existing enforcement procedures.*

If the [agency official] *should find that a State or local pollution control agency is not acting to abate violations of implementation plans or to enforce certification requirements, he would be expected to use the full force of federal law. Also,* [the official] *should apply the penalty provisions of this section to the maximum extent necessary to underwrite the strong public demand for abatement of air pollution and to enforce compliance with provisions of the Act.*

* * *

The [official] *would be authorized to issue such an order when he determined that a State had not satisfactorily administered its enforcement authority under its implementation plan or when there was a violation of federal standards.*[43]

The Clean Air Act federal enforcement provision ultimately enacted modified the provision in the Senate bill in two principal respects. First, it deleted the requirement that the state have failed satisfactorily to administer its implementation plan prior to initiation of federal action. In this respect, EPA's legal authority to commence suit was enlarged. The second change was the introduction of a requirement for thirty days prior notice to the state and to the violator—a procedural constraint on EPA's authority to act. The legislative history provides little insight into these changes, which on their face, appear to have made residual federal enforcement authority independent of state failure to enforce the SIP, or otherwise to administer the statute adequately.

When acting to enforce a SIP, however, EPA is not entirely independent of the state. In finding a violation of a SIP, the EPA Administrator must "defer to the interpretation of the plan advanced by the state"[44] so long as the state's interpretation is reasonable and otherwise consistent with the Act. In addition, an EPA finding of a SIP violation gives rise to a nondiscretionary duty to inform the state.

Despite these limitations, the US Court of Appeals has taken a broad view of the federal role: "Upon approval or promulgation of a state implementation plan, the requirements thereof have the force and effect of federal law, and may be enforced by the [EPA] Administrator in federal courts."[45] EPA, then, retains authority to step in and implement federal air quality standards by enforcing approved state implementation plans.

F. Withdrawal of Approval and Federal Assumption of Enforcement

The Clean Air Act SIP provision does not provide for withdrawal of approval of a state implementation plan. This stands in marked contrast to state hazardous waste programs under RCRA and to NPDES programs under the Clean Water Act, authorization or approval of which can be withdrawn. This discrepancy may stem from the structure of the Clean Air Act which provides for a central state role at the outset. There is no federal implementation plan which *precedes* promulgation of a SIP; accordingly there is no previously established federal plan to revert to when an approved SIP is found inadequate.

Moreover, when faced with an inadequate SIP, EPA is empowered to promulgate piecemeal revisions to bring the plan into compliance, obviating the need for authority to withdraw approval.

The closest analog to withdrawal of SIP approval is contained in a provision for "federal assumption of enforcement," available when EPA finds violations "so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively."[46] Before assuming enforcement, EPA must give the state notice of the problem and allow the state thirty days to improve its enforcement. If the state fails to take corrective action within this period, EPA may enforce any requirement of the SIP without providing prior notice to the state.

This period of federally assumed enforcement continues until the state satisfies EPA that it wil enforce the SIP. As with inadequacies in the content of the SIP, there is no provision for compelling the state to improve its enforcement; the state's showing must be "an act of voluntary cooperation rather than one made under the compulsion of a compliance order or civil action."[47]

Although the legislative history provides little insight into the assumption process, the language of the Act appears to contemplate a substantial showing of necessity before EPA may step in and assume full enforcement powers. As a general matter, EPA may act against individual violators after providing thirty days notice to the violator and the state. Federal assumption of enforcement removes this constraint. But a resort to expanded federal enforcement authority requires more than a showing of an unaddressed violation--there must be a pattern of widespread violations.

V. State Hazardous Waste Programs Under the Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA) is the United States' principal regulatory statute for the management of hazardous waste.[48] Enacted in 1976 as an amendment to the Solid Waste Disposal Act, RCRA was Congress's response to the increasingly severe threat to human health and the environment posed by the unregulated generation and disposal of hazardous waste. The Act closed the last major gap in the federal scheme for environmental regulation.

RCRA mandated a comprehensive national regulatory program for hazardous wastes embodying what soon came to be called a "cradle-to-grave" regulatory approach. It required EPA to impose a broad range of strict requirements on those engaged in the treatment, storage, and disposal of hazardous waste through standard-setting[49], formulation of permit conditions and procedures[50], identification of wastes as hazardous[51], and institution of civil and criminal penalties to compel compliance.[52]

A. State Implementation of the Federal Program

Although the Act institutes a federal program, states are provided a central role in implementation. Each state is authorized to develop and implement its own hazardous waste program to operate "in lieu of" the federal program, upon a finding by EPA that such program is equivalent to the federal program.[53] Upon authorization of a state program, the state assumes responsibility for permitting and enforcement. Setting of minimum standards remains entirely a federal function. EPA retains an enforcement role, but with an obligation to provide notice to the state before issuing compliance orders or commencing a civil action.

This allocation of function strikes a balance that is predominantly federal in character, in contrast to the other programs discussed in this paper. For example, the Clean Air Act SIP permits the states to set emissions standards for existing sources and affords relatively greater latitude in regulating to attain the federal air quality standards. Similarly, the Clean Water Act assigns to the states the task of setting water quality standards. Following approval of a state NPDES program, the Act has states set effluent limitations for individual sources as well. RCRA's hazardous waste provisions intend a more limited role for states. Minimum standard setting remains the sole province of the federal government. It need not follow, however, that in carrying out functions allocated to them (*i.e.*, permitting and enforcement) the states are intended less discretion than in the SIP or NPDES programs.

B. Historical Context

The House Report that preceded RCRA's passage in 1976 provides a compelling rationale for the policy of national uniformity in hazardous waste management.[54] The Report describes at length instances of damage caused by then-current hazardous waste disposal practices. The Report stresses that the enumerated damages occurred in spite of the fact that most states had some regulatory power over hazardous waste. The ineffective state programs were also characterized by extreme diversity in approach.

In response to what it considered inconsistent and inadequate state regulation, Congress decided to enter the field and impose minimum standards that states would administer and enforce. The House Report describes the underlying policy thus:

> *The general purpose of having federal minimum standards for hazardous waste disposal, with the option of state implementation of state programs equivalent to the federal program, is 1) it provides uniformity among states as to how hazardous wastes are regulated; 2) it provides industry and commercial establishments that generate such wastes uniformity among states; 3) by providing such uniformity a state with environmentally sound laws does not drive business out of the state to a state which, for economic reasons, decides to be a dumping ground for hazardous wastes; and 4) by permitting states to develop and implement hazardous waste programs equivalent to the federal program, the police powers of the states are utilized rather than the creation of another federal bureaucracy to implement this act.*[55]

C. Authorization of State Hazardous Waste Programs

RCRA's language suggests that Congress intended a minimum of agency discretion in the authorization process. Within ninety days following submission of a proposed state program, EPA is required to issue notice whether authorization is expected. A submitted state program is authorized by statute unless EPA determines, within ninety days after such notice, that it is not equivalent to the federal program, that it is inconsistent with the federal program or other state programs, or that it does not provide for adequate enforcement.[56] Thus both the basis and the timing of EPA's approval are structured by statute.

The scope of EPA's discretion in making the determinations of equivalence, consistency, and enforceability is not well defined. The legislative history is silent as to the meaning of those terms; the House Report simply restates the language in the statute.[57] Nevertheless, the concerns of the Report mentioned above may be read as suggesting that Congress held a fairly broad notion of equivalency, and that it did not intend EPA to reject submitted state programs on the basis of minor objections. The discrepancies between state programs cited in the Report were major, not minor.

A House colloquy, technically beyond the legislative history, confirms this view:

> *State requirements should be equivalent in overall effect to the Federal program, without the necessity of showing point-by-point equivalence. . . . It was not Congress's intent to require States to xerox the Federal programs.*[58]

D. Federal Enforcement of Authorized State Programs

RCRA departs from the oversight scheme under the Clean Water Act and the Clean Air Act in that it does not provide for federal assumption of enforcement. This discrepancy may reflect the fact that, unlike the other two statutes, RCRA does not allocate standard-setting to the states. Therefore there is no reason to assume enforcement while leaving other functions in state hands. Put another way, by providing for federal assumption of enforcement, the other two statutes offer EPA a middle ground between simple exercise of residual federal enforcement authority and complete withdrawal of program approval. RCRA provides the Agency with a more limited set of options when faced with an inadequate state program.

Upon approval of a state hazardous waste program, EPA retains extensive enforcement authority. The Act provides that, for any hazardous waste violations, EPA may: 1) issue an order assessing a civil penalty; 2) issue an order requiring compliance; 3) revoke or suspend a permit; or 4) commence an action for a civil penalty, an injunction, or other appropriate relief.[59] Where the violation occurs in a state with an authorized program, EPA is required to give notice to the state prior to issuing an order or bringing suit.

RCRA's concurrent federal-state enforcement scheme raises numerous questions about the coordination of federal and state enforcement efforts. As a policy matter, the preclusive effect of state enforcement has crucial implications for the character and intensiveness of EPA's oversight. If an enforcement action taken by a state preempts subsequent action under EPA's residual enforcement authority, EPA has an enormous interest in the adequacy of the state action.

At least three potential bases exist for preclusion of federal enforcement by a prior state action. They are: 1) statutory preclusion; 2) federal abstention doctrines; and 3) principles of res judicata. Because RCRA expressly contemplates federal enforcement in authorized states, and does not tie such activity to the absence or inadequacy of state enforcement, it is apparent that no statutory basis exists for preclusion.

Res judicata principles—which bar relitigation of a question resolved by a final judgment on the merits—are more troubling in their implications for a federal action after state enforcement. The matter awaits further resolution in the courts.

E. Withdrawal of Authorization

RCRA requires EPA to withdraw authorization of a state program that is not administered and enforced in accordance with the Act, unless the state takes appropriate

corrective action within a reasonable time after notice. The Act contemplates an oversight function, but by its terms appears to relate more to program administration and enforcement than to the substantive provisions contained in the state program. RCRA's legislative history, however, takes a relatively expansive view of the oversight function, and makes it clear that EPA must also monitor the *content* of an authorized program:

> [I]*f the state program is not equivalent, or becomes not equivalent after it is authorized, the Administrator, after notice and opportunity for the State to have a hearing, is authorized to enforce the federal minimum standards relating to such hazardous waste program in such state.*
>
> * * *
>
> *Therefore, a state retains the primary authority to implement its hazardous waste program so long as such program remains equivalent to the minimum federal standards.*[60]

This expansive view is appropriate. Because states are expressly authorized to impose standards more stringent than federal minimum standards, the relationship between the two programs is dynamic. This is also true because federal standards themselves are open to periodic revision. These factors give rise to a continuing need for oversight of program content.

The administration and enforcement of the state program provides a second focus for EPA oversight. The statute provides little insight into the nature and intensity of EPA oversight, requiring simply that state administration and enforcement be in accordance with the Act.

The legislative history also is inconclusive but offers some guidance. The House Report states that where "violations of the Act are occurring and the state fails to take action,"[61] EPA may step in and commence enforcement. Although this language concerns EPA's residual enforcement powers, it may be argued that the existence of unaddressed violations is intended to prompt EPA enforcement–not withdrawal of program authorization. This view is bolstered by the fact that the language quoted follows directly a discussion of program inequivalency, a situation for which withdrawal of authorization *is* the specified course of action.

The policy underlying RCRA's federal-state scheme is to utilize state police power to enforce federally-prescribed minimum standards. Even when supported by substantively equivalent statutory authority, state enforcement efforts inevitably will differ from those EPA might have taken. As a consequence, EPA may afford considerable latitude to state enforcement decisions. Such latitude comes at little expense because EPA has not given up its power to enforce on a case-by-case basis.

By contrast, and in light of the statutory requirements for program equivalency, the content of state programs may call for closer scrutiny. Still, the requirement of equivalency may be met by something less than a state "clone" of the federal program.

VI. CONCLUSION

The foregoing review of federal-state relations under US environmental regulatory programs reveals several themes. First, Congress has, on the whole, valued national uniformity in standard-setting. Each of the three Acts surveyed contains provisions setting national technology-based or environmental quality standards. The Clean Air Act created national standards for ambient air quality; the Clean Water Act imposed national technology-based standards for new sources; and the Resource Conservation and Recovery Act set national *minimum* requirements for management of hazardous waste. Congress sought to guarantee all citizens fundamental levels of environmental quality, and, by setting minimum technology standards, to prevent states from bidding for industry by tolerating lax regulatory environments. The federal government was seen as best placed to carry out the scientific research necessary for setting many of these standards. And although the laws do not say so expressly, national requirements for "best available technology" act as incentives for development of new technologies by ensuring a national marketplace for innovations.

A second theme is Congress's recognition of the states' unique capacities with respect to implementation. Each of the statutes provides a central role for state permitting and enforcement. The Clean Air Act SIP called on states at the very outset to assume an active role. No cautious withdrawal of a "federal implementation plan" accompanied authorization of the SIP. Similarly, the Clean Water Act reinstated traditional state primacy in water law, and through an interim authorization process sought to avoid displacement of ongoing state permitting programs. RCRA afforded states somewhat less control, perhaps, but sought nonetheless a prompt transfer of the federally-designed program. Clearly the states have been seen as best situated for the day-to-day administration of environmental regulation.

As for state enforcement, Congress has been more equivocal. In general there has been an effort to utilize the states' police powers where doing so would not jeopardize the integrity of the federal program. But the same political factors that conspire to create "pollution havens" through lax regulation also exert a compromising effect on state enforcement. As a result, EPA always retains some residual enforcement capacity, and, under two of the statutes, is authorized to "take back" the enforcement function from the states through a process of federal assumption.

The European Community has long afforded its member countries relative freedom in implementing Community Directives on environment. Directives are binding on EC members, but their implementation has largely been left to the national governments. Although, the Commission legally holds more coercive power over EC members than does the US federal government over the states, as a practical matter it has been unable to undertake the kind of close environmental oversight that EPA exercises. As the EC moves more squarely into the environmental arena this is likely to change; the US balance between localized implementation and a strong federal enforcement presence may present an increasingly relevant model.

Perhaps the most likely area of controversy in 1992 will be the issue of uniform Community environmental standards. If rigidly interpreted, the mandate to remove trade barriers may undercut an equally vital policy favoring stringent environmental regulation. The Community requirements for consensus in the past have led to "lowest common denominator" regulation–especially given the diversity of member states. The practice of some countries to legislate over and above EC standards may be challenged as a barrier to trade.

Here the US experience may offer some guidance. The Commerce Clause of the US Constitution prohibits the American states from enacting legislation that will impede interstate commerce or lead to what has been called "economic Balkanization." The parallels to EC policy are fully apparent. Stringent environmental regulation by individual American states, however, cannot be successfully challenged under the Commerce Clause if the legislating state can demonstrate a legitimate question of public welfare that cannot be protected in a less restrictive manner.

Flexibility is similarly protected in the statutory context. The federal move toward national uniformity has been through the use of *minimum* standards, generally leaving the states free to regulate more stringently than the federal requirements. Even under RCRA, which calls on states to establish programs "equivalent" to the federal program, flexibility has been allowed. In this respect, the US system has sought to provide a regulatory floor, letting its diverse member states serve as a "laboratory" for new and more stringent approaches to environmental protection.

ENDNOTES

1. CWA §208.

2. CWA § 303.

3. CWA §404.

4. CWA §402(b).

5. CWA §402(d).

6. CWA §309(a)(1).

7. S.Rep. No. 414, 92d Cong., 1st Sess. 8 (1971).

8. CWA §301(b).

9. CWA §303(a).

10. CWA §§ 301, 302, 402(a)(1).

11. CWA §402(b).

12. CWA §509(b)(1)(D).

13. House consideration of the Conference Report, October 4, 1972, *reprinted in Legislative History* at 261.

14. CWA §402(d).

15. Ford Motor Co. v. EPA, 567 F.2d 661 (6th Cir. 1977).

16. CWA §309(a)(1).

17. *Legislative History* at 174.

18. CWA §309(a)(2).

19. CAA §113(a)(2).

20. CWA §402(c)(3).

21. 118 Cong. Rec. H33761 (1972) (statement of Rep. Wright).

22. CWA §402(c)(3).

23. CAA §112.

24. CAA §111(b).

25. CAA §111(d).

26. CAA §110.

27. CAA §101(b)(1).

28. CAA §101(a).

29. CAA §109.

30. CAA §110.

31. CAA §110(a)(2).

32. *Id.*

33. Publ. L. No. 90-148 (1967).

34. CAA §110(a)(2).

35. CAA §110(c).

36. 116 Cong. Rec. S42386 (1970)(statement of Sen. Muskie).

37. Train v. NRDC, 421 U.S. 60, 79 (1975).

38. CAA §113(a).

39. CAA §110(a)(2)(H)(ii).

40. *See* Train *supra.*

41. District of Columbia v. Train, 521 F.2d 971, 984 (D.C. Cir. 1975).

42. *See* Air Quality Act at §108.

43. S.Rep. No. 1196, 91st Cong., 2d Sess. 21-22 (1970).

44. Wisconsin's Envtl. Decade, Inc. v. Wisconsin Power and Light Co., 395 F. Supp. 313 (W.D. Wis. 1975).

45. Union Elec. Co. v. EPA, 515 F.2d 206, 211 (8th Cir.), *affirmed*, 427 U.S. 246 (1975).

46. CAA §113(a)(2).

47. District of Columbia v. Train, 521 F.2d 971, 986 (D.C. Cir. 1975).

48. RCRA §§ 3001-3119.

49. RCRA §3004.

50. RCRA §3005.

51. RCRA §3001.

52. RCRA §3008.

53. RCRA §3006.

54. H.R.Rep. (hereinafter House Report) No. 1491, 94th Cong., 2d Sess. 4, 17-24 (1976).

55. House Report at 30.

56. RCRA §3006(b).

57. House Report at 29.

58. 129 Cong. Rec. H9154 (daily ed. Nov. 3, 1983).

59. RCRA §3008.

60. House Report at 31-32.

61. House Report at 32.

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